SANITARY LEGISLATION.

COURT DECISIONS.

PENNSYLVANIA SUPREME COURT.

Water for Domestic Use—Company Furnishing Impure Water can not Collect Water Rates.

CITY OF NEW CASTLE *v.* NEW CASTLE WATER CO., 95 Atl. Rep., 534. (July 3, 1915.)

Both the State law and its contract with the city required the water company to furnish pure and wholesome water to the inhabitants of the city of New Castle. During a period of about a month and a half the water was unfit for domestic use. The court affirmed a decree restraining the water company from collecting from domestic consumers for more than half of the quarter year during part of which the water was impure.

It was the duty of the New Castle Water Co., under the law and under its contract with the city of New Castle, to furnish pure and wholesome water to the inhabitants of the city. The supply of water was obtained from the Shenango River. The findings of the court showed that prior to and after December 1, 1912, and up to the time the bill in this suit was filed the water furnished by the company contained bacteria, including "bacteria coli," in such quantities "as to render said water of such a character that the same might be considered dangerous to the public health, although there was no perceptible increase in the amount of sickness in the city during the said time."

Between December 1, 1912, and March 1, 1913, "a great portion of the time, amounting to about six or seven weeks," the water furnished by the company was so impure, being contaminated with industrial wastes, as to render it unfit for drinking or cooking purposes, and even for bathing. It had an offensive odor and could be used only for washing, scrubbing, and similar purposes.

After the filing of the bill the company took measures to correct the conditions complained of, and when the testimony was taken the water was "good, pure, and wholesome."

The chancellor in the court below entered the following decree:

(1) That the City of New Castle Water Co., defendant, be, and is hereby, restrained from collecting from all domestic consumers and users of water (not including water furnished to the public schools) in said city of New Castle any moneys or water rates for 1½ months (one-half of a quarter) between December 1, 1912, and March 1, 1913, during which time the said company did not furnish pure water.

(2) That said company be, and it is hereby, restrained from turning or cutting off the water supply of the said plaintiffs and of all other domestic consumers or users of water in said city, by reason of or for failure to pay said company for the impure water furnished by said company, for 1½ months, between December 1, 1912, and March 1, 1913.

(3) That the water rates which the said company shall collect from the said plaintiffs and other domestic consumers and users of water in said city are hereby reduced and changed, between December 1, 1912, and March 1, 1913, so as to prohibit and restrain said company from collecting water rates for 1½ months between said dates.

BROWN, J.:

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The third and fourth prayers of the bill had been answered by the company itself, and no decree was needed to compel it to perform its duty to furnish pure water. But if it had not performed this duty after the bill of the complainants had been filed to compel performance, they would have been entitled to a decree to compel performance and to enjoin the collection of any charges for impure water furnished to domestic consumers. Brymer et al. *v.* Butler Water Co. (172 Pa., 489; 33 Atl., 707) is conclusive of this. But learned counsel for defendant contend that, inasmuch as the evils complained of in the bill had been actually corrected by the company by the time the learned court had concluded the taking of testimony, its decree enjoining the collection of water charges for impure water furnished to domestic consumers for 1½ months, between December 1, 1912, and March 1, 1913, during which period it did not furnish pure water, is error for want of jurisdiction to make it; in other words, the contention is that whether the water company can collect water rents or charges during the said period is a question to be decided by a jury on the law side of the court, and not by a chancellor. This is really the sole and narrow question in the case.

The defendant company was incorporated under the act of April 29, 1874 (P. L. 73), and its right to furnish water within the district covered by its charter is an exclusive one; but the duty imposed upon it is to "at all times furnish pure water," and jurisdiction is conferred upon the court of common pleas within the district covered by the charter to enforce performance of the company's duties. That jurisdiction is thus conferred:

> Any citizen using the same [water] may make complaint of impurity or deficiency in quantity, or both, to the court of common pleas of the proper county, by bill filed, and after hearing the parties touching the same, the said court shall have power to make such order in the premises as may seem just and equitable, and may dismiss the complaints or compel the corporation to correct the evil complained of.

This provision in the act of 1874 has been incorporated in all the amendments to it.

If, as was distinctly held in Brymer et al. *v.* Butler Water Co., supra, a decree ordering a water company to furnish pure water to its customers within its district may, and properly does, include an order enjoining the making or collecting of any charge for impure water furnished, why should the decree complained of in the case at bar be reversed? The reason urged for its reversal is that the court below, in the exercise of its equitable jurisdiction conferred by the act of 1874, was confined to a correction of the evils complained of, and, as they did not continue up to final hearing, as in the Brymer case, it is without application. We are unable to follow this reasoning. While the jurisdiction conferred by the act of 1874 is to enable the proper court to compel a water company to furnish pure water, that court, in exercising the jurisdiction conferred upon it, may "make such order in the premises as may seem just and equitable." Would it be just and equitable to permit this appellant to charge and collect for impure water merely because, after a bill had been filed to compel it to perform its duty, it has performed by the time the chancellor was ready to make his decree? He was authorized by the statute to make such decree in the premises as seemed just and equitable, and this is a complete answer to the denial of his equitable jurisdiction to make the decree of which appellant complains. Suppose the relation between the water company and the city of New Castle was a contractual one; it was at the same time controlled by statute conferring upon the court below power to compel the water company to perform its duty, and, in the exercise of its jurisdiction, to make any just and equitable order, in a proceeding like the present one, instituted to compel performance of a contractual and statutory duty. The appellant did not perform, but nevertheless insists that the appellees must perform, under penalty of having their water supply cut off. This inequitable proposition is thus answered by Mr. Justice Williams in the Brymer case:

It is inequitable that a corporation chartered to serve a "public use" and actually undertaking to serve the public with one of the necessaries of life should be allowed to collect the price of a supply of good water from those to whom it delivers an article that can not be used, or be made fit for use by any process within their knowledge or reach. The relations between the defendant and its customers rest on contract, and if the commodity bargained for is not delivered it is elementary law that the price is not recoverable. * * * Practically it is unimportant whether the water becomes unfit for use because of the neglect, or in spite of the vigilance of the company. The question to be considered as between the seller and buyer is: What is the fact? Is the water fit for use? The same question is also to be investigated by the court on behalf of the public. Is the company meeting the objects of its organization and discharging its duty to the State by fairly serving the public use to which it is required to minister? If this question must be answered in the negative, then the remedy is to order the company to render better service, and to suspend its right to collect rents until water is furnished that can be used with reasonable safety to its customers.

The decree is confined to domestic consumers and users of water for the period of but one month and a half. It is as mild as the undisputed facts could have justified. From all others than domestic consumers the company may collect for impure water furnished. In making his decree the learned chancellor had before him the contract between the water company and the city, and domestic consumers may be regarded as those therein so named and for whom rates are fixed. Apart from the contract, a domestic consumer of water is one using water in connection with his house or home, if its inherent and popular meaning is to be given to the word "domestic." Some water may have been used by domestic consumers in flushing closets or for washing or other purposes, but defendant company offered no evidence as to this, and the court below was not asked to modify its decree in view of such use of the water.

Each of the assignments of error is overruled and the decree affirmed at appellant's costs.

ELKIN, J., dissents.